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NO. 66-98

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

JAMES A. SECREST, SHERIFF OF CHRISTIAN COUNTY, ILLINOIS, Plaintiff-Appellee, vs. DWIGHT H. DOSS, ARVILLA DOSS and MARION A. HUTSON, Defendants-Appellants.	)	Appeal from the Circuit Court of Christian County. Honorable Bill J. Slater, Judge Presiding.

Goldenhersh, J.

Defendants appeal from the judgment of the Circuit Court of Christian County in the amount of $1713.00, entered after a non-jury trial.

Plaintiff, Sheriff of Christian County, sues to recover costs and expenses incurred for the storage of property seized in a replevin suit in which the defendant, Dwight H. Doss, was plaintiff. This action is based upon the replevin bond given by defendant, Dwight H. Doss, to plaintiff's predecessor in office prior to service of the Writ of Replevin. Dwight H. Doss is principal and defendants, Arvilla Doss and Marion A. Hutson, are sureties on the bond. All further references to "defendant" mean the defendant, Dwight H. Doss.

In July of 1961, defendant caused a Writ of Replevin to be issued out of the Circuit Court of Macon County. The Writ of Replevin was delivered to Andrew E. Marucco, then Sheriff of Christian County. Mr. Marucco testified that upon receipt of the Writ he took possession of the Caterpillar Road Grader therein described, that he called N. E. Hutson, defendant's attorney, by phone, and

informed him that he had put the grader in a lumber yard at Mt. Auburn, that he had agreed with the proprietor of the lumber yard to store the grader for a dollar a day, and had arranged to put anti-freeze in the grader.

In August 1961, N. E. Hutson, defendant's attorney, wrote the sheriff stating that he understood both defendants in Christian County had now been served in the replevin suit, and that before he left on vacation he had learned that the sheriff had served one defendant, and recovered the property. He requested the sheriff to make return of the Writ and send it to him with his statement of costs.

In January 1963, plaintiff wrote Mr. Hutson asking why nothing had been done, and pointing out that there was due for storage the sum of $560.00.

In August 1964, the State's Attorney of Christian County wrote Mr. Hutson inquiring whether the replevin case was completed, and informing him the storage charge then due was $1184.00.

The docket sheet of the Circuit Court of Macon County, a copy of which is in evidence, shows various preliminary proceedings, and on March 21, 1966, a non-jury trial and judgment for plaintiff (defendant here).

As grounds for reversal, defendants contend that (a) plaintiff failed to show compliance with the statutes pertinent to replevin in that the property seized was not delivered to defendant (b) plaintiff failed to return the Writ of Replevin or the Replevin Bond to the Clerk of the Circuit Court of Macon County, (c) plaintiff failed to prove damages in that he failed to prove the reasonable value of the storage charges (d) the lumber yard operator could not legally recover

storage charges because he did not have a license to engage in the business of the storage of personal property as required by Ch. 111 2/3, section 119, Ill. Rev. Stat. 1965, and (e) the action is brought by the wrong party.

An examination of the testimony and exhibits reveals ample evidence to support a finding that the arrangement made for the storage of the road grader was a constructive delivery of the property and was in compliance with the statutory requirement that the property be delivered to the plaintiff in the replevin suit. Walsh v. Thompson, 24 Ill. App. 2d 474, cited by defendants, is clearly distinguishable. In that case the sheriff, acting under a writ of retorno habendo, took possession of an automobile, and the suit was directed against the surety on a forthcoming bond. There the plaintiff had paid the storage charges incurred and the issue presented was whether they could be recovered from the defendant's surety. The entries shown on the docket sheet of the Circuit Court of Macon County support a finding that the replevin action was not prosecuted "without delay". Admittedly, the Writ of Replevin and the Replevin Bond were not returned promptly by the sheriff, but the record does not show that defendant was in any manner prejudiced thereby. The People ex rel v. Yott, 91 Ill. 11, and The People v. Wiltshire, 9 Ill. App. 374, cited by defendants, are so clearly distinguishable as to require no further comment. The evidence also supports the finding that the charge of $1.00 per day was agreed upon, and it was, therefore, not necessary to prove the reasonable value of the services.

With respect to defendants' contention that the storage charge cannot be recovered from defendant because Homer Morgret, the lumber

yard operator, violated the provisions of Chapter 111 2/3, section 119, Ill. Rev. Stat. 1965, we have examined the statute and conclude that in the absence of evidence of engaging in the activities specifically prohibited by the Public Utilities Act, the statute does not bar recovery of the charge made. We have examined the cases cited by defendants and find them distinguishable for the reason that they involved situations which were clearly in violation of public policy.

Defendants' final contention is that the suit was brought by the wrong party. We have examined Schott v. Youree, 142 Ill. 233, cited by defendants, and conclude that the holding there does not preclude the plaintiff's being a proper party to bring this action. The storage of the property continued beyond the termination of Marucco's term of office, and the charges continued to accrue into plaintiff's term. Under the circumstances plaintiff was a proper party to bring the action, and if defendants desired that Marucco be made a party, an appropriate motion should have been filed in the trial court.

For the reasons herein set forth, the judgment of the Circuit Court of Christian County is affirmed.

Judgment Affirmed.

Concur: George J. Moran

Concur: Edward C. Eberspacher

PUBLISH ABSTRACT ONLY

82 I.A. 2d 51

No. 66-112

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

MILTON KROENIG and ED SCHEMPP, Plaintiffs-Appellants, -vs- CASPER YOCH, Defendant-Appellee.	Appeal from the Circuit Court of St. Clair County, Illinois. Honorable Richard T. Carter, Judge Presiding.

George J. Moran, P.J.

This is an appeal from an order of the Circuit Court of St. Clair County, Illinois, denying the plaintiffs' motion to set aside an order dismissing the plaintiffs' complaint.

The trial court granted the defendant's motion to dismiss the plaintiffs' complaint. Subsequently, the plaintiffs filed a motion to set aside the order of dismissal and to reinstate the case or, in the alternative, for leave to file an amended complaint. The court then entered the following order:

> Motion filed by the Plaintiffs to set aside an Order of Dismissal having been previously entered by the Court is denied.

The docket entry reads:

> Motion of Plaintiffs to Reinstate the above case and set aside the Order of Dismissal entered is hereby denied; and the Original Order of Dismissal still stands.

There is no indication in the record that the trial court ever ruled on the alternative motion for leave to file an amended complaint.

We do not believe that the order appealed from is a final and appealable order which terminated the litigation between the parties on the merits of the cause, so that, if affirmed, the trial court has only to proceed with the execution of the judgment. Village of Niles v. Szczesny, 13 Ill 2d 45.

In a case very similar to the present case, Schoen v. Caterpillar Tractor Co., 77 Ill App 2d 315, 222 NE2d 332, the court stated, at page 334:

> The obvious purpose (of the appealability rule) therefore is to prevent a multiplicity of suits and piecemeal appeals. Consequently, those trial orders dismissing or striking complaints, which if affirmed, might result in the filing by the plaintiff of a new suit or amended complaint arising from the same transaction, are found not to be final and appealable because they have not terminated the litigation between the parties. If a plaintiff desires to stand on his complaint after it has been dismissed for failure to state a cause of action, he should so indicate to the trial court, whereupon a final judgment can be entered for the defendant.

However, in accordance with Ariola v. Nigro, 13 Ill 2d 200, if the trial court, upon application of appellant, sees fit to enter a judgment which is final and conclusive, this court on appeal from such judgment would deem it unnecessary to have the parties reprint their briefs and will decide the appeal on the record as thus supplemented and on the briefs filed in this cause. Robinson v. Genesco, 77 Ill App 2d 308, 222 NE2d 331.

For the foregoing reasons, this appeal is dismissed.

Appeal Dismissed.

CONCUR:

Honorable Joseph H. Goldenhersh

Honorable Edward C. Eberspacher

PUBLISH ABSTRACT ONLY

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,	)	
	)	COURT OF COOK COUNTY.
v.	)	
	)	
ALBERT TEGGELAAR	)	No. 50231
FRANK E. HIBBS	)	50232
CLARENCE FENNEMA	)	50233
MICHAEL J. FERRARO	)	50234
HAROLD P. IRWIN	)	50235
JOHN MORRO	)	50236
HAROLD G. IRWIN	)	50237
JOHN J. LYONS	)	50238
STANLEY W. PRYKA	)	50239
JAMES P. MEYERS	)	50240
ROBERT J. DAMSTRA	)	50241
HAROLD J. CARTER	)	50242
FRANK GUTTILLA,	)	50243
	)	
Defendants-Appellants.	)	

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

The defendants in the above entitled cases were convicted for operating overweight motor vehicles, and each defendant now contends that the State failed to prove the violation beyond a reasonable doubt. The State has moved to dismiss the appeals on the ground that the issues raised cannot be decided in the absence of a bill of exceptions or report of proceedings or an agreed statement of facts and that no genuine document of that nature has been filed in any of these cases. We have this day dismissed another such appeal on that basis, People v. Andrews, Illinois Appellate Court Gen. No. 50230, and the issues regarding this motion are fully discussed in our opinion therein.

In each of these appeals, documents purporting to be agreed statements of fact were appended to the record for review. The State did not stipulate to any of these documents nor were they acceptable as reports of proceedings. We held in People v. Andrews, supra, that the record was inadequate for a review of the issues raised and dismissed the appeal. The same action must be taken

in the cases hereinbefore listed.

Moreover, the issues on the merits here involved have been resolved against the defendants' contentions in recent decisions of this court. People v. Fair, 61 Ill. App. 2d 360, 210 N.E.2d 593; People v. Fraschetti, 73 Ill. App. 2d 449, 220 N.E.2d 98; People v. Hansen, 74 Ill. App. 2d 49, 220 N.E.2d 96.

The motion to dismiss the appeals is allowed.

Motion to dismiss appeals allowed.

Sullivan, P.J., and Dempsey, J., concur.

Abstract only.

51275

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, v. JAMES BURKS, Plaintiff in Error.	)	WRIT OF ERROR TO THE CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

Defendant appeals from an order denying his petition for a second hearing under the Post-Conviction Hearing Act. Ill. Rev. Stat., ch. 38, § 122 (1965). He was originally tried and convicted of unlawful sale of narcotics and given the minimum sentence of ten years to ten years and a day. His first post-conviction petition alleged that he had been coerced by threats of a severe sentence to withdraw his plea of not guilty and to plead guilty, that he was promised a lesser sentence than he received and that he was denied counsel of his choice. A hearing was held to consider these allegations and the petition was denied. Defendant did not appeal from that order, but instead presented a second petition. This was dismissed on the ground that the order entered on the first petition was res adjudicata.

The statute provides:

> "Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." Ill. Rev. Stat., ch. 38, § 122-3 (1965).

There is no provision for the filing of a second petition. The trial court did not err in denying it. People v. Chapman, 33 Ill. 2d 429, 211 N.E.2d 712.

Judgment affirmed.

Sullivan, P.J., and Dempsey, J., concur.

Abstract only.

Abstract only.

50811

LEO PAZDELL,

Plaintiff-Appellant,

v.

JOSEPH F. COTTELLER and H. J. MACKIN, individually and as partners d/b/a AMERICAN CALCULATING AND TYPING SERVICE,

Defendants-Appellees.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. PRESIDING JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a verdict and judgment in favor of defendants and seeks a new trial on the issue of damages alone or for a new trial on all issues. Plaintiff contends that the verdict was against the manifest weight of the evidence, and that the trial court committed prejudicial error in its rulings.

On December 26, 1957, at approximately 2:00 P.M., plaintiff's northbound car collided with defendants' eastbound car in the northbound lanes of Wacker Drive at the Washington Street intersection. Both drivers had stopped for Wacker Drive traffic lights, and defendants' driver was completing a left turn east from the southbound lanes of Wacker Drive.

At the intersection, Washington is a one-way eastbound street, with six lanes. Wacker Drive is a north and south divided highway, with four northbound lanes and four southbound lanes. The width of the divider is not in the record. There are four traffic lights on the corners and one on the northeast edge of the divider and one on the southwest edge. Plaintiff states, "The physical layout of the light system was such that if a car were going southbound on Wacker and turned left to go east on Washington the driver would have a north-south green light before and as he was proceeding southbound to go into his turn and a red light

at the divider as he came out of his left turn facing east. He would also have a red light on the northwest corner as he faced east."

Plaintiff's evidence included the testimony of plaintiff, an eyewitness and several physicians. Plaintiff testified that he was operating his automobile northbound on Wacker Drive and stopped at Washington Street for a light change. He was in the second lane east of the divider. As the light turned green, he noticed a woman step off the divider on his left and proceed to walk east in the crosswalk on the south side of Washington Street and pass in front of his car. Plaintiff started up after she passed his car and while she was in front of the car to his right. While waiting for the light, he had noticed cars in the southbound lanes but did not notice any of these cars before he started up, because he was looking forward for pedestrians. There were pedestrians on the northeast corner of the curb and none on the center divider. As he entered the fourth lane of Washington Street (north of the south curb line of Washington), he saw an eastbound car in front of his car, about a foot or so away, and he applied his brakes. The front of his car struck the other car between the two doors. He was going about eight miles an hour at the time of impact.

Plaintiff's occurrence witness testified that he was driving north on Wacker and had stopped at Washington, alongside of plaintiff's vehicle. He allowed the eastbound pedestrian to clear the front of his car, and as he turned right into Washington Street, he heard the impact of two automobiles. The northbound car (plaintiff's) came to an immediate stop at the impact, but the southbound car (defendants') continued on 25 to 30 feet further.

He further testified that at the time of the impact, the front of plaintiff's car was well past the third lane from the south edge of Washington Street, and that the color of the light for north and south traffic on Wacker was green.

The driver of defendants' car, Joseph T. Cotteller, testified that on December 26, 1957, he was 18 years of age and a student at "Quigley Preparatory Seminary." He had been working for defendant, his father, during the Christmas vacation delivering packages to customers. He was driving south on Wacker and had stopped at Washington for a red light, intending to make a left-hand turn on Washington to go east. He stated, "When I came to a stop at Washington I was in the eastern most lane of the southbound traffic, there were no vehicles stopped ahead of me. * * * I turned my left turn signal on after the light turned to green I made the lefthand turn onto Washington and I glanced over to see if the northbound traffic on Wacker was coming or not. And there was a pedestrian walking in front of the car so I continued on across the intersection. * * * I believe there were two vehicles stopped facing in a northerly direction." As he entered the northbound lanes of Wacker Drive, he was going about five miles an hour. After he looked to his right and saw the vehicle stop for the pedestrian, he accelerated and continued across the intersection. Just before the impact, he was in the second lane from the east of the northbound lanes of Wacker. He had seen plaintiff's car stop before he entered the lanes and saw it again before the impact, about five feet away from his car. On cross-examination, he testified that from the time he started to make his left turn, and "as I faced east on Washington, that light was red"; also, that he did not sound

his horn; from the point he started up to the point of impact was 45 feet and that his highest speed was "10 to 15 miles per hour."

Initially, we consider plaintiff's contention that the verdict for defendants was against the manifest weight of the evidence, and that the court should have allowed plaintiff's motion for a directed verdict on the issue of liability at the close of all the evidence.

Plaintiff asserts that whenever traffic is controlled by traffic control signals, and the light is red, vehicular traffic facing the signal shall remain standing until the green indication is shown unless otherwise directed by a sign or arrow. (Ill. Rev. Stat. 1957, Ch. 95-1/2, ¶ 128, § 31(a), and ¶ 129, § 32(c).) From this plaintiff argues, "There was no evidence of any direction by a police officer nor were there any other directions indicated by a sign or arrow. The photographs in evidence and the testimony of the witnesses conclusively show that there was adequate space within which the defendants' car could and should have been brought to a stop."

In support of the charge that defendants failed to yield the right-of-way while making a left-hand turn, plaintiff cites the statutory provision for a "vechicle turning left":

> "The driver of a vehicle within an intersection intending to turn to the left shall yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard, but said driver, having so yielded and having given a signal when and as required by this Act, may make such left turn and the drivers of all other vehicles approaching the intersection from said opposite direction shall yield the right-of-way to the vehicle making the left turn." (Ill. Rev. Stat. 1953, Ch. 95-1/2, ¶ 166, § 69.)

On this point, plaintiff argues that the defendants' driver "once having given his left turn signal and having started into his turn he never slowed down but rather he accelerated. He left a position of safety where he could have stayed; he knew the plaintiff had the green light for north and south traffic and in his haste to accelerate and to usurp the right of way he sounded no horn and he caused a collision."

Plaintiff further asserts that he was free from negligence and had a right to rely upon the defendant obeying the law. Plaintiff argues he was going from a stop position on a green light and was watching out for pedestrians, forward and to his right on the northeast corner of the intersection, and "after having waited for a pedestrian to cross in the south crosswalk it was only natural that he should devote some attention to the pedestrians that were at the east curb on the north side of Washington and that could have crossed in front of him if they had chosen to do exactly what the defendant had done; that is, go out against a red light. Plaintiff had a right to assume that defendants' driver before entering the intersection would ascertain whether he could proceed with safety across Wacker Drive." Cited is Roberts v. Cipfl, 313 Ill. App. 373, 375, 40 N.E.2d 629 (1942), for the principle that "a person has a right to presume that other parties will obey the statutes and ordinances in force in a given place."

Defendants argue that although the light governing the Washington Street traffic was red, this traffic signal had no control over defendants' left turn because there was no evidence offered by plaintiff to show the intersection came within the following statutory definition:

> "Where a highway includes two roadways 40 feet or more apart, then every crossing of each roadway of such divided highway by an intersecting highway shall be regarded as a separate intersection." (Ill. Rev. Stat. 1957, Ch. 95-1/2, ¶ 110(b).)

On this point we note that the trial court said, "There is no evidence in the record of anything that a left-hand turn is prohibited on that light there, because I, personally, am very familiar with that corner. I walk it and I see it and see many people that make that eastbound turn on that red light on the assumption that the red light refers to only direct east and west traffic."

[1] After examining this record, we conclude from the evidence that defendants' turn to the left was controlled by the provisions of paragraph 166, Chapter 95-1/2, and that defendants' driver was permitted to proceed across the northbound Wacker lanes after having yielded "the right-of-way to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard," and after giving the proper signal.

Defendants' driver testified that he saw plaintiff's northbound car was stopped and that a pedestrian was crossing in front of plaintiff's car, "so I continued on across the intersection." Under the facts portrayed here, we think reasonable men might differ as to whether defendants' driver was negligent or in the exercise of due care and caution in proceeding across the northbound lanes of Wacker Drive. Therefore, the question of whether he should have yielded the right-of-way to plaintiff was one which was for the consideration of the jury. We hold the court was correct in denying plaintiff's motion for a

directed verdict on the issue of negligence and in submitting the issue to the jury.

This court cannot disturb the verdict of the jury unless it is against the manifest weight of the evidence and an opposite conclusion is clearly evident. (Black v. DeWitt, 55 Ill. App.2d 220, 225, 204 N.E.2d 820 (1965).) From our examination of this record, we find no merit in the contention that the verdict for defendants is against the manifest weight of the evidence.

Plaintiff also contends that his motion for a mistrial should have been allowed. This was based on the premise that it was an appeal to passion and prejudice to identify the driver of defendants' automobile as having been a student at "Quigley Preparatory Seminary," when such fact was immaterial to the case. Prior to the examination of the witness, there was a discussion between court and counsel as to excluding from the jury "any evidence or questions as to the occupation of young Mr. Cotteller, who is a seminary student as I understand it, and has no relevancy to the issue in this case. * * * I think would be highly prejudicial." After discussion, the court ruled, "You can show it at the time this happened, he was a student at Quigley High School." The question put to the witness was, "And where were you attending school?", and the answer was, "Quigley Preparatory Seminary, in Chicago." We agree that verdicts should not stand which are the result of appeals to passion and prejudice, but we do not believe the instant situation presents such an appeal. We find no error in the court's denying the motion for a mistrial at this point.

We consider next plaintiff's complaint of trial errors. In our view of this case, there was no abuse of discretion by the

trial court in withdrawing from the jury (1) the issue of whether defendant was guilty of a statutory violation of operating a vehicle upon a public highway at a speed greater than was reasonable and proper with regard to traffic conditions, and the use of the highway to endanger the safety of persons; or (2) the issue which charged the defendant with the statutory violation of disobeying a red traffic control light and failing to stop before entering the intersection. We find no prejudicial error in the improper remark made by defendants' counsel in his final argument that "the two boys weren't hurt in the car." When the remark was made, the court sustained an objection and instructed the jury to disregard the remark. We agree with plaintiff that it was improper for the trial judge to express his personal knowledge of the intersection in ruling on the statutory violation issues, but do not believe that the remarks were prejudicial to defendant.

In conclusion, we believe this record shows that the proper issues, together with adequate instructions, were submitted to the jury and that both sides received a fair trial. We find no error that might be considered prejudicial to the rights of plaintiff, and that would warrant the granting of a new trial. See Moore & Co. v. Champaign Nat'l Bank, 13 Ill. App.2d 232, 246, 141 N.E.2d 97 (1957).

For the reasons stated, the judgment of the Circuit Court is affirmed.

AFFIRMED.

BURMAN and ADESKO, JJ., concur.

Abstract only.

51093

ROBERT H. JAMES, Plaintiff-Appellant, v. BANK OF HIGHLAND PARK and MARVIN HOLLAND, Defendants-Appellees.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, COUNTY DEPARTMENT, LAW DIVISION.

MR. PRESIDING JUSTICE LYONS DELIVERED THE OPINION OF THE COURT:

This is an appeal from a judgment entered on an order which dismissed the complaint of the plaintiff, Robert H. James, on motions of the defendants, Bank of Highland Park and Marvin Holland, respectively, for failure to state a cause of action.

Summarizing the plaintiff's complaint, it alleges in substance (1) that the defendant-bank possessed a lien in its favor on an automobile purchased by plaintiff with the use of funds borrowed, in part, from said defendant, (2) that the loan was guaranteed by defendant-Holland, (3) that on or about November 20, 1964, the automobile was repossessed by either or both of the defendants, (4) that on or about November 23, 1964, the title to the aforesaid vehicle was surrendered by plaintiff to the Secretary of State of the State of Illinois, who thereafter issued a new title, bearing the same serial number, to the defendant-bank, (5) that plaintiff's vehicle registration plates, having been theretofore affixed to his auto, the plaintiff, on numerous occasions after repossession, unsuccessfully requested the return of such plates from both defendants, (6) that on or about December 18, 1964, each defendant knowingly permitted the said license plates of plaintiff's to remain affixed to the vehicle, and specifically authorized a person or persons to operate the vehicle upon the highways of the State of Illinois in that condition, (7) that each defendant, by so doing, violated the following provisions of the Illinois Motor Vehicle Law, Ill. Rev. Stat. (1957), Chap. 95 1/2, Secs. 3-501, 3-502, 3-504, 3-701, 3-702, 3-703, 3-811, 4-102(j), and 4-103(e), (8) that on or about December 18, 1964, the vehicle, bearing plaintiff's plates, was involved in a traffic incident in Cook County, Illinois, and

that the motorist driving the said vehicle did not stop at the scene of the occurrence, (9) that one Harry Kulp, having obtained the serial number off the registration plates on the fleeing vehicle, did thereafter complain to the police, such complaint serving as the basis for the issuance of a warrant for the arrest of plaintiff, (10) that on or about March 3, 1965, plaintiff was arrested on the traffic charge on the complaint of Kulp and taken into the custody of police authorities and that the criminal charge was dismissed after a hearing, (11) that as a direct consequence of the intentional, wilful, and wanton misconduct of each defendant, plaintiff sustained damage by reason of his embarrassment, arrest, detention, being held for trial, expense of posting bond and legal fees, as well as the injurious reflection upon his employment as a private chauffeur, and (12) that as of June 17, 1965, title to the said vehicle has remained in the name of the defendant-bank.

The complaint was filed July 22, 1965. Motions to dismiss were filed by each defendant and sustained. The court thereupon entered an order dismissing the complaint for its failure to state a cause of action and entered judgment thereon, from which this appeal is taken.

It is the plaintiff's theory of the case that the complaint sets forth a valid cause of action both under the common law and the statutes relied upon and hence the order of dismissal was contrary to the law. More specifically, plaintiff contends (1) that by filing motions to dismiss, defendants have admitted their wilful violation of the statutes, (2) that as public safety statutes, plaintiff was a member of the class intended to benefit from the statutes' protection, (3) that as such, the violation of the statutes constitutes prima facie evidence of negligence, and (4) that such negligence was the direct and foreseeable consequence of the damage for which he complains.

It is defendant-bank's theory of the case (1) that in

essence the action is one sounding in false arrest and imprisonment, which is neither a negligence action nor an action within the legislative purview of the penal statutes relied upon, and (2) that the complaint does not allege that either the arresting officer or the complainant were its agent or employee.

It is defendant-Holland's theory of the case (1) that none of the statutes relied upon impose a duty upon him to the plaintiff, and (2) that a violation of any of the enumerated statutes in the complaint does not create civil liability in favor of plaintiff.

An appeal from an order dismissing a complaint for its failure to state a cause of action preserves for review only a question of law as to the complaint's legal sufficiency. A motion to dismiss admits, for purpose of review, only such facts as are well pleaded, but it does not admit conclusions of law, the pleader's construction of a statute, or conclusions of fact unsupported by allegations of specific facts upon which such conclusions rest. Washington v. Courtesy Motor Sales, Inc., 48 Ill. App.2d 380, 199 N.E.2d 263 (1964), People ex rel. Hannawell v. Dimmick, 35 Ill. App.2d 10, 181 N.E.2d 825 (1962). The defendants, by their motions, have not admitted having violated the statutes relied upon, because such allegations, as found in the complaint, are but conclusions of law.

While on review of such an order of dismissal, the complaint is to be construed most strongly against the pleader. However, he is entitled to all the reasonable intendments and inferences which can be drawn from the language employed by him in the complaint. McGill v. 830 S. Michigan Hotel, 68 Ill. App.2d 351, 216 N.E.2d 273 (1966). Examined from this proper perspective, it cannot be said that the complaint, standing alone, alleges facts sufficient, under the law, to sustain a valid cause of action.

As to defendant-Holland the order of dismissal must be sustained. No allegation can be found in the complaint which charges

that he either had title to or possession of the vehicle or that he ever had occasion to operate it. Rather, defendant-Holland is simply alleged to have been the guarantor of plaintiff's indebtedness to defendant-bank. The plaintiff cannot charge defendant-Holland with the violation of a statutory duty that does not exist within the meaning of Ill. Rev. Stat., Chap. 95 1/2, Secs. 3-501, 3-502, 3-504, 3-701, 3-702, 3-703, and 3-811, nor is it pleaded that defendant-Holland participated in the alleged violation with a fraudulent intent to misrepresent the vehicle's identity within the meaning of Ill. Rev. Stat., Chap. 95 1/2, Secs. 4-102(j) and 4-103(e).

Penal statutes must be strictly construed and are not to be extended to matters not within the clear import of the language used. People v. Norman Acceptance Company, 17 Ill. App.2d 215, 149 N.E.2d 653 (1958). This court is of the opinion that there is a total absence of allegations upon any reasonable construction or inference given the statutes by us, which would create a possible duty on the defendant-Holland, and hence the statutory cause of action, as to him, was properly dismissed. Nor can it be maintained that the complaint avers facts sufficient to support a common law negligence action against defendant-Holland. To state a cause of action for breach of duty, the duty must first be alleged. Stelloh v. Cottage 83, 52 Ill. App.2d 168, 201 N.E.2d 672 (1964), Bottorff v. Spence, 36 Ill. App.2d 128, 183 N.E.2d 1 (1962). The imposition of the common law duty of reasonable care has not been established in the complaint, as such complaint is barren of any facts to evidence a relationship upon which the existence of such a duty could be founded. Moreover, plaintiff, in this regard, does not plead freedom from contributory negligence. Absent such fundamental requisites, the complaint as to defendant-Holland cannot stand.

The plaintiff relies heavily upon the cases of Ney v. Yellow Cab Co., 2 Ill.2d 74, 117 N.E.2d 74 (1954) and Kacena v. George W. Bowers Company, Inc., 63 Ill. App.2d 27, 211 N.E.2d 563 (1965) as

authority for his contention that violation of a motor vehicle statute establishes prima facie evidence of negligence. While this court agrees with Ney and Kacena in that a negligence action may be grounded in the violation of a penal statute, neither case represents precedent for the proposition of law presented in the instant case. Both the Ney and Kacena decisions hinged upon the judicial interpretation given to an entirely different provision of Motor Vehicle legislation; that is, the leaving of the ignition key in an unattended motor vehicle in violation of Article XIV, Section 92 of the Uniform Act Regulating Traffic on Highways. [Ill. Rev. Stat., Chap. 95 1/2, Sec. 189 (1955)]. Moreover, neither decision dealt with the sufficiency of the pleadings but were rather appeals of jury verdicts.

The violation of a statute is prima facie evidence of negligence provided the plaintiff falls within the class of persons the statute intended to protect, Dini v. Naiditch, 20 Ill.2d 406, 170 N.E.2d 881 (1960), Schwartz v. City of Chicago, 63 Ill. App.2d 416, 211 N.E.2d 477 (1965), Gula v. Gawel, 71 Ill. App.2d 174, 218 N.E.2d 42 (1966), and the violation is the proximate cause of the injury. Ney v. Yellow Cab Co., supra, Kacena v. George W. Bowers Company, Inc., supra, Kapka v. Urbaszewski, 47 Ill. App.2d 321, 198 N.E.2d 569 (1964). The injury, to be actionable against either defendant, must have been the natural and probable result of the alleged negligence or statutory violation as the case may be, a consequence that could have been reasonably foreseen or anticipated by an ordinarily prudent person. Moreover, the lapse of time coupled with the intervening independent wrongful act of some third person has been held to not necessarily break the chain of causation set in motion by the original misconduct if such intervening act was itself reasonably foreseeable or probable. Ney v. Yellow Cab Co., supra, Kacena v. George W. Bowers Company, Inc., supra.

This court is of the opinion that the question of proximate cause is dispositive of the sole question of law we are called upon to answer, thereby rendering any detailed analysis and interpretation of the statutes relied upon unnecessary. In the case at bar, plaintiff complains of being arrested, detained, embarrassed, forced to incur legal expenses, and of injury to his occupational competence as a chauffeur. We can look no further than the four corners of the complaint. Triangle Sign Company v. Randolph & State Property, Inc., 16 Ill. App.2d 21, 147 N.E.2d 451 (1957). The action is one for damages sounded essentially for the plaintiff's false arrest and imprisonment. False arrest and imprisonment consists of an unlawful restraint of an individual's personal liberty or freedom of locomotion. Johnson v. Jackson, 43 Ill. App.2d 251, 193 N.E.2d 485 (1963). If it were not for the plaintiff's arrest and detention, there would have been no injury to him.

Even assuming plaintiff has properly averred intentional misconduct by defendants sufficient of itself to sustain a false arrest and imprisonment action, the complaint must nonetheless fall as to both the common law and statutory allegations for want of proximate cause. An action for false arrest and imprisonment is one involving the common factor of wrongful restraint which will lie only against the persons actually procuring or participating in such restraint either directly or by virtue of another acting in his stead. Develing et al. v. Sheldon, 83 Ill. 390 (1876), Gill v. Lewin, 321 Ill. App. 633, 53 N.E.2d 336 (1944), Aldridge v. Fox, 348 Ill. App. 96, 108 N.E.2d 139 (1952), Johnson v. Jackson, 43 Ill. App.2d 251, 193 N.E.2d 485 (1963). Neither the arresting officer nor Kulp, who procured the arrest, were alleged to have been the agent or employee of either defendant. A warrant was issued for plaintiff's arrest solely upon Kulp's erroneous assumption that the vehicle was owned and operated by the person whose registration plates appeared thereon.

Furthermore, the arrest itself was not consummated until approximately 2 1/2 months after the traffic incident.

The question of proximate cause and foreseeability is not a matter subject to broad applicable rules of law. Rather, it raises a unique question in each specific case because of the attendant circumstances which may or may not have occasioned the injury. While this question of proximate cause and foreseeability is normally a question of fact for the jury, a motion to dismiss for failure to state a cause of action presents causation as a question of law before the reviewing court. Economy Auto Ins. Co. v. Brown, 334 Ill. App. 579, 79 N.E.2d 854 (1948). Such is the case before us. At most the alleged misconduct of defendants merely created the existence of a condition upon which the subsequent independent acts of Kulp and the arresting officer operated and thus could not have been the proximate cause of the injury. It is fundamental that there can be no recovery in any tort action unless there is a causal connection between the negligence of defendant and the injury sustained. If the negligence of defendant does nothing more than furnish a condition by which the injury is made possible, and that condition causes an injury by the subsequent act of a third person, the two are not concurrent and the existence of the condition is not the proximate cause of injury. Gilbert v. Goralnik, 238 Ill. App. 199 (1925), Briske v. Village of Burnham, 379 Ill. 193, 39 N.E.2d 976 (1942), Economy Auto Ins. Co. v. Brown, supra.

It was thus this intervening force and not the alleged common law or statutory violation of the defendants here, which occasioned and was the proximate cause of the particular injury as set forth in the complaint. Suffice to say, the conduct complained of, when viewed from within the four corners of the complaint, could not, as a matter of law, have been the proximate cause of the injury. We do not think that our General Assembly envisioned a contrary conclusion

in drafting the penal statutes brought here under consideration.

For the above reasons, the judgment entered on the order dismissing the complaint for its failure to state a cause of action is affirmed.

JUDGMENT AFFIRMED.

BURKE, J., and BRYANT, J., concur.

51456

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, v. DAVID SANDERS (Impleaded), Plaintiff in Error.	Writ of Error from the Criminal Court of Cook County.

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT.

John Walker, Robert House and the defendant David Sanders were indicted for rape. In a nonjury trial they were found guilty. This appeal is by Sanders, who was sentenced to the penitentiary for 35 years. He admits having intercourse with the prosecutrix but contends that the evidence does not prove beyond a reasonable doubt that it was against her will.

The prosecutrix worked for her mother in a tavern. She finished work at 4 A.M. on March 12, 1961, and her brother drove her home. On the way he stopped his car and entered a building while his sister waited in the car. He left the motor running and his keys in the ignition. David Sanders, 19 years of age, John Walker, 16, and Robert House, 16, were drinking wine while walking along the street and they approached the car. They jerked the door open and jumped in. Walker got in the front seat next to the prosecutrix. Sanders got behind the wheel and House entered the back seat. Walker had a knife and he told the girl not to move or yell. He asked for her money and she gave it to him. As her brother returned to his car Sanders drove off. The brother ran to a phone and called the police.

When they stopped for a traffic light Walker held

the knife on her and told her not to jump out. Sanders drove into a dead-end alley, parked the car and told her to get into the rear seat and House to go up in front. Sanders had intercourse with her and was followed by Walker. House was on top of her when they told him to get up because they were driving to another place. At the second location Sanders and Walker left the car and House resumed his sexual act. Sanders and Walker returned, told House to get out. They drove on and told her that she would have to repeat what took place moments earlier. She started to cry and she pleaded with them to drive her home. They relented and, directed by her, drove to within a block of her home.

The prosecutrix immediately told her father what had happened and he called the police. The police took her to a hospital where a doctor examined her. After this she was taken to the police station. Later that day she and her brother accompanied the police while they searched the neighborhood where she had been abducted and raped. A wine bottle and her brother's car were found. The police left for a moment to question some people and while they were gone she saw Walker walking down the street. Her brother followed him while she summoned the police. Walker started to run but was caught when he fled into a building. He admitted that he had raped her and gave the names of the boys who were with him and where they could be found. She pointed Sanders out in a field house in a park. He was arrested and and searched. He had a knife; he also had her brother's

sunglasses and a picture of her brother's girl friend which had been taken from the glove compartment of her brother's car. Sanders admitted raping her as did House when he was arrested.

Each defendant gave a detailed statement to the police in the presence of the prosecutrix and one another. Each told what he and the others did and their stories were completely corroborative of the prosecutrix' subsequent testimony. Sanders was asked in his statement whether she submitted to him willingly and he replied, "No. She was scared not to give in to me." The following day a joint statement was made by them in the State's Attorney's office. In this statement House revealed that he pretended he had a gun and told the prosecutrix to be quiet and that nobody would harm her if she did what they wanted her to do.

At the trial Sanders admitted, but Walker and House denied, having intercourse with the prosecutrix. Walker said he did not have a knife when he got in the car. He said he found the knife in the car's glove compartment as they were driving the girl home. Sanders said the same thing and testified he got the knife, the sunglasses and the picture which were found on him from Walker.

[1] When a defendant is charged with the crime of rape the State must prove beyond a reasonable doubt that the act of intercourse was performed forcibly and against the will of the victim. Ill. Rev. Stat., (1959) ch. 38, para 490. If the victim has the use of her faculties and physical powers she must resist to the extent possible; the evidence must

establish that it was against her will. However, it is not necessary for her to resist where resistance would be futile or would endanger her life, or where she is overcome by superior strength or paralyzed by fear. People v. Smith. 32 Ill. 2d 88, 203 N.E.2d 879 (1965).

Resistance would have been dangerous and futile in the present case. The prosecutrix was kidnapped and overpowered by three youths. A knife was brandished in her face and she was threatened with a gun. The evidence clearly establishes that the intercourse was forcible and was against her will.

The judgment of the Criminal Court is affirmed.

Affirmed.

Sullivan, P.J., and Schwartz, J., concur.

Abstract only.

No 66-96

In The

APPELLATE COURT OF ILLINOIS

Third District

A. D. 1967

Abstract

WILFRED WIERMAN, Plaintiff-Appellee, vs. BIRD PROVISION CO., a corporation, Defendant-Appellant.	)	Appeal from the Circuit Court of the Tenth Judicial Circuit, Tazewell County.

CORYN, J.

Wilfred Wierman, plaintiff, filed suit against Bird Provision Company, defendant, his former employer, alleging that defendant owes him certain monies for expenses he incurred on behalf of defendant while employed as a salesman for defendant. Bird Provision Company counterclaimed against plaintiff, alleging that plaintiff owes Bird certain monies for false and erroneous expenditures submitted by plaintiff on his expense account to defendant, and for which plaintiff thereafter received payment from defendant. The case was tried before a jury of twelve in the Magistrate's Division of the Circuit Court of Tazewell County. The jury found against the plaintiff on his complaint, and for the defendant on its counterclaim, but assessed the damages as "none." The defendant here appeals claiming that the trial magistrate, when the

M-51083

HELEN SCHEURER,
Plaintiff-Appellant,

v.

WILLIAM H. CHRISTOPHER,
Defendant-Appellee.

APPEAL FROM THE
MUNICIPAL COURT OF CHICAGO,
FIRST MUNICIPAL DISTRICT,
CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

This is an appeal from a judgment in favor of the defendant, William H. Christopher. We need only concern ourselves with plaintiff's first allegation of error, that the trial court committed reversible error when it entered a judgment in favor of the defendant on the court's own motion and before the plaintiff had rested.

This cause of action arose out of an automobile accident involving an automobile owned by the plaintiff and driven by plaintiff's sister, Marie Scheurer, and an automobile owned and driven by the defendant. Plaintiff's theory at trial was that her sister was in possession of the automobile as a bailee and that any contributory negligence on the part of Marie Scheurer would not prevent a recovery by the plaintiff as bailor from the defendant.

At the trial the plaintiff's first witness was Marie Scheurer, sister of the plaintiff. After this witness was dismissed by the attorney for the plaintiff, the trial court stopped the proceedings, made a finding of not guilty and entered a judgment in favor of the defendant on its own motion. At this time the plaintiff herself had not been on the stand or testified and she had not exercised her privilege to call the defendant under Section 60 of the Civil Practice Act. At the hearing on the post-trial motion the plaintiff's motion for a new trial was denied, although it was pointed out to the court that the plaintiff had not testified and had not completed her case.

The time for making a motion for a finding, or to make a finding on its own motion is not a subject to debate. Chap. 110,

§ 64(4), Ill. Rev. Stat. 1965, is quite clear in stating that:

> "Upon the trial of a proceeding in equity and in cases at law tried without a jury defendant may, at the close of plaintiff's case, (emphasis supplied) move for a finding, judgment or decree in his favor. In ruling on the motion the court shall weigh the evidence. If the ruling on the motion is favorable to the defendant, a judgment or decree dismissing the action shall be entered. If the ruling on the motion is adverse to the defendant he may proceed to adduce evidence in support of his defense, in which event the motion is waived.
>
> "If a judgment or decree of dismissal entered at the close of the plaintiff's case is reversed on appeal, the cause shall be remanded to the trial court with directions to proceed as though the motion had been denied by the trial court or waived."

From our consideration of the record it is clear that the plaintiff had not finished presenting the evidence supporting her position. In view of the above quoted provision of the Civil Practice Act and the recognized practice it is clear that this judgment must be and it is reversed and the cause is remanded for proceedings consistent with the holding of this opinion.

JUDGMENT REVERSED AND CAUSE REMANDED.

LYONS, P.J., and BURKE, J., concur.

51371

ELAINE VRANDACK, Incompetent, Petitioner-Appellee,	)	
	)	APPEAL FROM THE
v.	)	CIRCUIT COURT OF
	)	COOK COUNTY.
FRANK VRANDACK, Conservator, Respondent-Appellant.	)	

MR. PRESIDING JUSTICE LYONS DELIVERED THE OPINION OF THE COURT:

This is an appeal from final orders entered by the trial court in the course of a competency hearing. The petitioner-appellee, Elaine Vrandack, initiated the proceedings below, petitioning the court to declare her competent, disallow certain fees involved, and to be repossessed of all her properties then in the hands of her conservator. Her prayers for relief were granted.

The conservator-appellant, the appellee's husband, now brings this appeal alleging (1) that the finding by the trial judge that the appellee was not incompetent, and that the revocation of the appellant's Letters of Conservatorship were against the manifest weight of the evidence, (2) that the court erred in denying appellant costs and attorney's fees pursuant to Section 41 of the Civil Practice Act, (3) that the court erred in denying him conservator's fees and reasonable attorney's fees for services rendered in the administration of appellee's estate, and (4) that the court erred in refusing to approve appellant's Statement of Facts, submitted to that court for review purposes.

Neither a Report of Proceedings, nor alternatively, a Statement of Facts, pursuant to Supreme Court Rule 36(1) (d) has been filed in this court by the appellant. Appellant did not engage a court reporter in the trial court. In lieu thereof, he endeavored to prepare an agreed upon Statement of Facts. Appellant stated that he submitted such a prepared statement to the appellee's attorney for approval, who, despite repeated assurance of approval, returned it to the appellant unsigned, after a long delay. Since appellant's time for filing had

nearly expired, he brought the matter before the trial judge who, upon a full hearing, refused to approve the Statement of Facts. The appellant explains that he was thereafter precluded from petitioning the court for an extension of time to file the record on appeal or instituting mandamus proceedings against the judge to compel his approval, because the judge had left the jurisdiction of the court on a vacation and appellant's time for filing was nearly exhausted.

We feel this contention is without merit. Notwithstanding the fact that the appellee's procrastination may have delayed the submission of the statement to the trial judge, the appellant's position was due to his own inaction. He could have foreseen the problem and initiated proceedings for an extension of time to certify and file or to file mandamus proceedings, before he found the statutory period nearing its end. The appellee's alleged procrastination in no way alters the duty imposed upon the appellant by statute to produce the agreed upon Statement of Facts. Brenza v. Jordan, 11 Ill. App.2d 140, 136 N.E.2d 571 (1956). Rather, it could have served as a basis for a petition for an extension of time.

A Report of Proceedings or Statement of Facts is requisite to this court's consideration and determination of the errors relied upon. A reviewing court will not pass upon issues of fact determined by the court below on the basis of evidence adduced at the trial, in the absence of such a record. Early v. Early, 13 Ill. App.2d 394, 141 N.E.2d 758 (1957), Hollister v.Greenfield, 58 Ill. App.2d 12, 207 N.E.2d 337 (1965).

Each of the respective orders entered below here under consideration included the words, "the court being fully advised in the premises." When a court signs an order containing such language, a court of review must assume, there being no record to evidence a contrary conclusion, that the court heard adequate evidence, and listened to sufficient law and argument, to enable that court to reach

what it believed to be the right decision on the issue/s presented. Smith v. Smith, 36 Ill. App.2d 55, 183 N.E.2d 559 (1962), Jones v. Jones, 48 Ill. App.2d 232, 198 N.E.2d 195 (1964). Moreover, there being no Report of Proceedings or Statement of Facts before us to consider, this court must assume that the evidence heard by the court below was sufficient to support the orders entered. Simon v. Estate of Kny, 19 Ill. App.2d 509, 154 N.E.2d 327 (1958), Cirignani v. Abernathy Cab Company, 19 Ill. App.2d 577, 154 N.E.2d 801 (1958), Janecko v. Appleton Electric Company, 38 Ill. App.2d 116, 186 N.E.2d 662 (1962), [U.S. cert. denied, 374 U.S. 808 (1963)], City of Chicago v. 3 Oaks Wrecking & Lumber Co., 65 Ill. App.2d 328, 213 N.E.2d 48 (1965), Kritzberg v. Kritzberg, Ill. App. Ct., 1st Dist., 3rd Div., No. 51071 (filed 3/16/67).

For the above reasons, the orders are affirmed.

AFFIRMED.

BURKE, J., and BRYANT, J., concur.

51144

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	Appeal from the Circuit
	)	
v.	)	Court of Cook County,
	)	
ROCCO PRANNO alias JIM PRANNO,	)	Municipal Court,
	)	
Defendant-Appellant.	)	Fourth District.

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT.

In this appeal the defendant contends that his conviction for battery and his sentence of four months in the Cook County Jail should be reversed because he was not proven guilty beyond a reasonable doubt.

The complaining witness, Laura Ann Dzurnik, was a tenant in an apartment building in Stone Park, Illinois. In the late afternoon of March 8, 1965, she went to the laundry room and placed some clothes in a washing machine. A short time later the defendant, who was a part owner of the building, knocked on her door and, after she opened it, asked if she had clothes in the machine and told her to get them out because another lady had been using the machine. Mrs. Dzurnik replied that she was not going to remove her clothes for anyone, asked him to leave and started to close the door. The defendant, who had his foot in the door, said that he did not have to leave. She said that if he did not go she would call the police.

According to her testimony, the defendant slapped her as she passed him on her way to the telephone booth, tried to force the door of the booth open as she placed her call and, after she completed her call, pulled her hair which caused her to fall.

Her testimony was corroborated by her mother who was in-

the apartment with the complaining witness and her children when the defendant came to the door. The mother followed them out of the apartment, went to her daughter's aid when she heard her say "Mother, come quick" and struck the defendant as he pulled her daughter's hair.

The defendant testified that a tenant had reported that she had been using the washer and that Mrs. Dzurnik had taken her place; that this was the second time she had taken another tenant's time on the washer and he went to her apartment to let her know about it and to tell her to take her clothes out. He said that as he stood inside the door she started screaming and cursing and told him if he didn't leave she would call the police. He replied that there was no need to notify the police, all he wanted her to do was to remove her things from the washer because she had taken someone else's time and that as he left the apartment she ran out toward the telephone booth. He denied striking her in the face or pulling her out of the phone booth.

An employee of the building and a tenant supported the defendant's testimony. The employee testified that he saw Mrs. Dzurnik come out of her apartment and walk toward the telephone booth. He said the defendant walked behind her but did not go to the booth and did not pull her hair or slap her face. He saw Mrs. Dzurnik's mother strike the defendant who then threw up his hands and walked away. He also said that earlier that afternoon he had seen Mrs. Dzurnik and her mother in a tavern. The tenant testified that he saw Mrs. Dzurnik leave her apartment and heard her using foul language; that

the defendant walked behind her and an elderly woman walked after the defendant and struck him in the back.

The two police officers who responded to Mrs. Dzurnik's telephone call also testified, one as a witness for the People and one as a witness for the defendant. They both said that they detected an odor of alcohol on her breath.

In summing up the evidence before making his finding, the trial judge said he questioned whether the complaining witness was in a tavern prior to the incident and even if she was there was nothing in the record to show that her drinking contributed in any way to the incident. He observed that the case reduced itself to the credibility of the witnesses and said that in his opinion the evidence conclusively showed that a battery had taken place.

The court was correct in its observation that the credibility of the witnesses was the determining factor in the case. If the evidence of the defendant was believed, he was not guilty of battery. If the evidence of the State was believed, the defendant was guilty of that offense. Although he may have been justified in reprimanding Mrs. Dzurnik for using the laundry time assigned to another woman, he was not justified in striking her. It was for the trial judge, as the trier of the facts, to appraise the witnesses and determine whom to believe and what weight to give to their testimony. His conclusion will not be disturbed. An Appellate Court will not set aside a judgment based on the credibility of witnesses unless from a review of the record it finds the proof improbable or so unsatisfactory as to raise some reasonable doubt of the defendant's guilt.

The defendant also contends that the trial court erred in not granting his motion for a new trial which was based upon newly discovered evidence. The action was supported by two affidavits. One was by the woman who had complained about her clothes being replaced, and the other was by a clerk in the tavern where the complaining witness was supposed to have been seen. The woman's affidavit said that after she complained to the manager of the apartments, she heard a woman using vile language. She saw this woman leave her apartment and walk toward the phone booth followed by the defendant. She said that the defendant did not strike the woman or pull her hair. The affidavit of the clerk said he was on duty at the tavern the afternoon of the alleged battery and that Mrs. Dzurnik and her mother were there drinking highballs.

The trial court did not abuse his discretion in denying the motion for a new trial. The evidence referred to in the affidavits was cumulative and was known to, or could have been known by, the defendant before his trial. In People v. Baker, 16 Ill. 2d 364, 158 N.E.2d 1 (1959), the court said:

> "A motion for a new trial on the ground of newly discovered evidence is addressed to the discretion of the trial judge and denial thereof will not be disturbed upon review in the absence of a showing of an abuse of discretion.... To warrant a new trial, the new evidence must be of such conclusive character that it will probably change the result on retrial, that it must be material to the issue but not merely cumulative, and that it must have been discovered since the trial and be of such character that it could not have been discovered prior to the trial by the exercise of due diligence."

The State's evidence established the defendant's guilt beyond a reasonable doubt and the court did not err in denying the defendant's post-trial motion. The judgment will be affirmed.

Affirmed.

Sullivan, P.J., and Schwartz, J., concur.

Abstract only.

Abstract only.

In The

APPELLATE COURT OF ILLINOIS

Third District

A. D. 1967

CLARENCE W. SHOEMAKER,

Plaintiff-Appellant,

vs.

BLUE SHIELD MEDICAL - SURGICAL PLAN OF THE ILLINOIS MEDICAL SERVICE,

Defendant-Appellee.

Abstract

Appeal from the Fourteenth Judicial Circuit, Mercer County, Illinois.

CORYN, J.

This is an appeal by Clarence W. Shoemaker, plaintiff, from judgment for defendant, Blue Shield Medical-Surgical Plan of the Illinois Medical Service, rendered after bench trial of this cause. Plaintiff's amended complaint alleged that the defendant, pursuant to the terms of its policy of insurance with plaintiff, was liable for the sum of $200.00 for surgical services incurred by plaintiff for a hip operation on September 30, 1965, and for expenses incurred by the plaintiff for general medical care and consultation to various named physicians in the amount of $75.00.

At the trial of this cause the contract of insurance between the parties hereto was admitted into evidence. The only other evidence presented was the testimony of plaintiff, who stated that he entered a hospital

at Iowa City, Iowa, in September, 1965, and that on September 9, 1965, an operation was performed on his left hip, and that on September 30, 1965, a similar operation was performed on his right hip. Plaintiff was continuously confined to the hospital in Iowa City from sometime prior to the first operation and until several weeks after the last operation. Plaintiff made no attempt to offer testimony of the various doctors who treated or operated on him. The trial court, in finding for the defendant, held that Section III(A)(3)(a) limited the liability of the defendant to the sum of $200.00 for multiple surgery within a ninety day period, and that in view of the fact that the defendant had paid to or on behalf of the plaintiff $200.00 for the surgery performed on September 9, 1965, it was not liable for an additional $200.00 for the surgery performed on September 30, 1965. The trial court also held that plaintiff had failed to prove his claim for consultation fees, and that therefore that claim was denied.

Section III(A)(3)(a) provides as follows:

"MEDICAL EXPENSE INDEMNITY FOR CHARGES OF PARTICIPATING PHYSICIANS.

"The Plan will pay to a Participating Physician, to apply against, but not to exceed, his fee, the respective amounts specified in the Schedule, for such of the following services as said Participating Physician may render to a Beneficiary after the date when this Contract shall become effective and prior to the date when this Contract shall terminate with respect to said Beneficiary. The Plan may require, as a condition precedent to any payment hereunder the filing of a claim pursuant to Article VII.

"(A) Surgical Service.

If a Beneficiary shall receive Surgical Service, and within ninety (90) days thereafter shall receive additional Surgical Service, then the maximum payable by the Plan for all Surgical Service received from the date of the first operation until the expiration of said ninety (90) day period shall be Two Hundred Dollars ($200.00), and such payments shall be made in the order that the services are rendered and in the manner described in sub-paragraphs III(A)(1), (2), (3) and (4) following until such maximum is paid. Said maximum shall also apply to the first and succeeding operation or operations received during any such subsequent ninety (90) day period. . . .

"(3) Multiple Procedures. If Inpatient Surgical Service or Surgical Service for the correction of fractures or complete dislocations shall involve two or more procedures, then, subject to the $200 limitation and the ninety (90) day basis as established in Article III(A), the obligation of the Plan shall be as follows:

"(a) If two or more procedures which are wholly unrelated and in different areas are performed during the same hospitalization, the Plan will pay the scheduled allowance for each procedure performed...."

Contracts of insurance, like other contracts, if not ambiguous or equivocal, are to be understood and interpreted according to their plain and ordinary sense or meaning. Canadian Radium Corp. v. Ind. Ins. Co., 411 Ill. 325, and Rubenstein v. Fireman's Fund Ins. Co., 339 Ill. App. 404. We are of the opinion that the terms of Sections III(A)3(a) of the contract of insurance between the parties hereto are clear and unambiguous, and that the plain and ordinary meaning of these sections of this contract is that the insuror's obligation to pay for surgical services is limited to $200.00 for all surgical services rendered during any given ninety day period, and that the $200.00 limitation within any ninety day period specifically applies to wholly unrelated multiple surgical procedures. Also, we are of the opinion, based on examination of the record, that the plaintiff wholly failed to establish his claim for reimbursement for medical consultation expenses. Accordingly, the judgment of the Circuit Court of Mercer County is affirmed.

Affirmed.

Stouder, P. J. and Alloy, J. concur.

51304)
) Consolidated
51305)

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	APPEAL FROM
	)	
v.	)	CIRCUIT COURT,
	)	
JAMES J. DECESARE,	)	COOK COUNTY.
	)	
Defendant-Appellant.	)	

MR. PRESIDING JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

After a bench trial, defendant was found guilty of the offense of gambling, in that he used or kept a book, instrument or apparatus for the purpose of recording and registering bets and wagers, in violation of Chapter 38, section 28-1(a)(5), Ill. Rev. Stat. Defendant was fined $50. On appeal, defendant's sole contention is that the court erred in denying his motion to quash the search warrant because the complaint for the search warrant did not show probable cause.

On May 28, 1965, a search warrant was issued by a judge upon the verified complaint for a search warrant made by Police Officer William Rotroff, as follows:

> "William Rotroff, complainant now appears before the undersigned judge of the Circuit Court of Cook County and requests the issuance of a search warrant to search (the person of _____ and 12003 So. Princeton Ave. house, Chicago, Illinois, Cook County, and seize the following instruments, articles and things: Including scratch sheets, horse bet records, and telephones, specifically; phone using line number 568-1588, all of which are being used to transact illegal horse betting, which have been used in the commission of, or which constitute evidence of the offense of Gambling.
>
> "Complainant says that he has probable cause to believe, based upon the following facts, that the above listed things to be seized are now located upon the (person and) premises set forth above:

> "Officer Rotroff was informed by a known and reliable informant, who in the past, has supplied Officer Rotroff with accurate and reliable information relative to illegal gambling activities, that the above informant is currently calling in his horse bets in to phone number 568-1588.
>
> "Officer Rotroff personally checked with phone company files which indicate that the above phone number is listed to a John Fanning, at 12003 S. Princeton Ave., Chicago, Illinois, (house) Cook County, and that the outgoing calls for this number average 225 calls for each month of April-March and Feb. 1965.
>
> "On the 28th. day of May 1965, about 2:pm, Officer Rotroff personally dialed the above number and after receiving an immediate response, gave the phone to the above informant who then called in a series of horse bets, specifically; '7th. race at Aqueduct, #4, "Rebel Light", $5.00 to win'. At the conclusion of this conversation to which Officer Rotroff was listening over an extension phone, the voice on the other end of the line was heard to say, 'are those all the bets you have for now, see you later'.
>
> "Based upon the above information, Officer Rotroff reasonably believes that the above phone and location are being used to transact illegal horse betting and that records of bets will be kept there-in."

The search warrant was executed by searching a house located at 12003 South Princeton Avenue, Chicago, and defendant was arrested in the house. He was charged with gambling and was found guilty after the testimony of William Rotroff and the receipt in evidence of the things identified by him as found in the house.

Defendant's authorities include Aguilar v. Texas, 378 U.S. 108 (1964), where the court reviewed at length the decisions in which guidelines were announced for the determination of probable cause sufficient to issue a search warrant. In discussing the sufficiency of an affidavit relied upon to show probable cause,

the court said (p. 114):

> "Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, Jones v. United States, 362 U.S. 257, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see Rugendorf v. United States, 376 U.S. 528, was 'credible' or his information 'reliable.' Otherwise, 'the inferences from the facts which lead to the complaint' will be drawn not 'by a neutral and detached magistrate,' as the Constitution requires, but instead, by a police officer 'engaged in the often competitive enterprise of ferreting out crime,' * * * or, as in this case, by an unidentified informant."

In Giordenello v. United States, 357 U.S. 480 (1959), in discussing a sufficient basis upon which a finding of probable cause could be made for the issuance of an arrest warrant, the court said (p. 486):

> "The purpose of the complaint, then, is to enable the appropriate magistrate, here a Commissioner, to determine whether the 'probable cause' required to support a warrant exists. The Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime."

In Stanford v. Texas, 379 U.S. 476 (1965), the court, in holding that a search warrant was invalid because of its failure to particularly describe the things to be seized, said (p. 485):

> "In short, what this history indispensably teaches is that the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain. * * *

> 'The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.'"

Defendant argues at length that the complaint for the search warrant did not show probable cause because the complaint was based upon improbable and impossible facts. Defendant asserts that "the officers sought, in execution of the instant search warrant evidence to determine if a law was being violated, rather than evidence of a violation of the law. They were not constitutionally confined or limited in what they sought or in what they were authorized to seize. The search warrant did not particularly describe what was to be seized or sought. The officers were left with unlimited powers and discretion to conduct not only an exploratory search, but to seize whatever they saw fit. This, the framers of the Constitution did not intend to be. This, the Constitution prohibits."

The State argues that the complaint is clearly sufficient. Its authorities include People v. Williams, 27 Ill.2d 542, 190 N.E.2d 303 (1963), where the State appealed from a trial court order which quashed a search warrant on the ground the complaint was based on unreliable hearsay statements of an informer, and the court said (p. 544):

> "In a recent decision the Supreme Court of the United States, with a single dissent, (Jones v. United States, 362 U.S. 257, 4 L. ed. 2d 697, 80 S. Ct. 725,) squarely held that hearsay may be the basis for issuance of a warrant. It was pointed out that probable cause is not established where the affidavit merely states the affiant's belief, or the belief of one other than the affiant, that there is cause to search; but that the personal observations of

> another set out in an affidavit are sufficient to establish probable cause, so long as a substantial basis for crediting the hearsay is presented. The facts are similar to those of the case at bar. There, the informant was known to the affiant, and had on previous occasions given information which was correct. Here the affidavit stated that the informant 'has, in the past given him information on illegal gambling operations which has proved to be reliable.' Furthermore, there was some corroboration of the informant's story in that he produced and delivered betting slips or receipts to the affiant."

In the complaint, the officer described the things to be seized and stated that the informant was reliable and was "currently calling in his horse bets." The officer set forth the details of a telephone call initiated by him and related the ensuing conversation. We find that the instant complaint for a search warrant met with the foregoing guidelines, probable cause was established on a substantial basis, and the things to be seized were adequately described.

For the reasons stated, the judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

BURMAN and ADESKO, JJ., concur.

Abstract only.

50513

PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. ERNEST YOUNG, Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, CRIMINAL DIVISION.

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

This is an appeal from a judgment of the Circuit Court of Cook County finding the defendant, Ernest Young, guilty of aggravated battery and sentencing him to the state penitentiary for a term of three to six years. Defendant contends that the evidence does not prove him guilty beyond a reasonable doubt.

The facts of the case are as follows: On July 19, 1962, a card game was in progress at 2139 West Jackson Blvd., Chicago. During the course of the game the defendant, Ernest Young, a part time minister and roofer, asked those present for an "ante" and was refused. Defendant then left the basement. Moments after he left two shots were fired through the window, one of which struck the complaining witness, Roy Bailey, in the face. As a result of the shooting Bailey was blinded in one eye and lost over one-half of the vision in the other eye.

At his trial the defendant stated that a man named Jimmy Jones ran up to him and told him to "Get in the car and carry me to where I'm going." Jones then allegedly forced the defendant to drive to the house of defendant's sister, where Jones used the bathroom and the defendant asked if he could use the telephone. Shortly after leaving his sister's house the defendant left the jurisdiction; he did not return until two years later when he was brought back to Illinois from Crown Point, Indiana, by Officer George Poplaski of the Chicago Police Department, under an extradition document.

While there was no eye-witness to the shooting, there was substantial circumstantial evidence to connect the defendant to the crime for which he was convicted. Briefly stated this evidence is as follows:

(1) On the return trip from Crown Point, Indiana, the defendant had a conversation with Officer Poplaski during which the defendant told Officer Poplaski that he would not have done the shooting if he had not been drinking.

(2) There was uncontradicted testimony from the complaining witness, Roy Bailey, that after the defendant had been returned from Indiana, the defendant went to the complaining witness and offered him money if he would not testify against the defendant. Such an attempt to purchase the complainant's silence is admissible as an indication of defendant's consciousness of guilt. People v. Gambony, 402 Ill. 74, 83 N.E.2d 321.

(3) Shortly after the crime the defendant, without having informed the police of the incident, which he claimed he saw, fled the jurisdiction to return only in the custody of a police officer. Defendant's flight is also a factor which tends to show his guilt. People v. Brown, 27 Ill.2d 23, 187 N.E.2d 728; People v. Lofton, 64 Ill. App.2d 238, 212 N.E.2d 705.

(4) Defendant was not a credible witness. He testified first that he had witnessed the shooting, later, he changed his testimony and denied that he had witnessed the shooting. The defendant then testified that he had only seen a man with a gun. Defendant also testified that he never gambled or drank. This testimony was contradicted by both the complaining witness and one Otis Lewis, who testified that he had seen the defendant drinking on a number of prior occasions.

It is well established that circumstantial evidence is sufficient to sustain a conviction. People v. Hansen, 359 Ill. 266, 194 N.E. 520; People v. Carrington, 13 Ill.2d 602, 150 N.E.2d 586. The record supports the judgment against the defendant based on credible evidence from which the court had a right to find that he was proved guilty beyond a reasonable doubt. The judgment is affirmed.

JUDGMENT AFFIRMED.

LYONS, P.J., and BURKE, J., concur.

51171 and 51172 Consolidated

COSMOPOLITAN NATIONAL BANK OF CHICAGO TRUSTEE UNDER TRUST NO. 10151, Plaintiff-Appellant, v. JACOB WHEELER, Defendant-Appellee.	)	APPEALS FROM CIRCUIT COURT OF COOK COUNTY, MUNICIPAL DIVISION.

MR. PRESIDING JUSTICE LYONS DELIVERED THE OPINION OF THE COURT:

This is a consolidated appeal of two cases brought by the plaintiff, Cosmopolitan National Bank of Chicago. The first case (#51171) is an appeal from an ex parte judgment for $110.00 and costs for one month's rent and from a subsequent order which denied plaintiff's motion to amend that judgment to $220.00, for two month's rent. The second case (#51172) is an appeal from an order which dismissed with prejudice plaintiff's distress for rent action and from a subsequent order which denied plaintiff's motion to vacate that order of dismissal.

The defendant, Jacob Wheeler, occupied the premises involved on a month to month tenancy for a rental of $110.00 per month. On October 25, 1965, two month's rent being due, the plaintiff instituted a joint proceeding below by verified complaint for possession and $220.00 rent due, pursuant to the provisions of Ill. Rev. Stat. (1965) Chap. 80, Sec. 8. The defendant neither filed an appearance nor answer to this claim. The court below in #51171 (the rent case), entered an ex parte judgment in favor of the plaintiff for possession but limited its recovery to $110.00 for one month's rent. The limitation was alleged by the plaintiff to have been based upon the court's erroneous reasoning that recovery was restricted to one month's rent, as specified in the five day notice action, notwithstanding the accompanying action for two month's rent.

On November 30, 1965, the plaintiff filed distress for rent proceedings for the value of three month's rent (#51172). The defendant

filed a pro se appearance in this case. On December 20, 1965, the Judge presiding in the Rent Court, ordered the distress proceedings to be dismissed on plaintiff's own motion. The trial judge thereafter entered an order which denied plaintiff's motion to amend the judgment in #51171 to $220.00. On December 30, 1965 an order was entered which denied plaintiff's motion to vacate the prior order of dismissal of #51172 which was entered on December 20, 1965.

It is plaintiff's theory in #51171 that the court erred in limiting the judgment to $110.00 and denying its subsequent motion to amend that judgment to $220.00 because (1) the five day notice for one month's rent which had been joined in the action was for eviction purposes only, and it in no way limited the accompanying claim for two month's rent due, (2) the plaintiff's unanswered verified complaint should have been considered as evidence by the court below of the defendant's indebtedness of $220.00, and (3) the judgment contradicts the record.

It is plaintiff's theory in #51172 that the court erred in dismissing with prejudice its distress for rent action and in denying its subsequent motion to vacate that order because (1) the order recited that it was based on plaintiff's own motion when, in fact, it made no such motion, and (2) the court was without jurisdiction to hear the case for it had been assigned and was pending before another court.

In neither case has plaintiff filed with this court a Report of Proceedings or Statement of Facts as required by our Supreme Court Rule 36. The Appellate Court will not review issues of fact determined below on the basis of pleadings and evidence adduced at the trial in the absence of this record. Early v. Early, 13 Ill. App.2d 394, 141 N.E.2d 758 (1957), Hollister v. Greenfield, 58 Ill. App.2d 12, 207 N.E.2d 337 (1965). There being no Report of Proceedings or Statement of Facts before us to consider, this court must assume that the evidence heard by the court below was sufficient to support the orders entered.

[illegible]

report of proceedings [illegible]

Court Rule 36. The appellant [illegible]

determined below on the basis [illegible]

ted in the absence of such a report. [illegible]

41 N.E.2d 759 (1957), [illegible]

N.E.2d 377 (1965). There being no report of proceedings of [illegible]

facts before us [illegible], this court must presume that the evidence

heard by the court below was sufficient to support the order [illegible]

Simon v. Estate of Kny, 19 Ill. App.2d 509, 154 N.E.2d 327 (1958), Cirignani v. Abernathy Cab Company, 19 Ill. App.2d 577, 154 N.E.2d 801 (1958), Janecko v. Appleton Electric Company, 38 Ill. App.2d 116, 186 N.E.2d 662 (1962) (cert. denied, 374 U.S.808), City of Chicago v. 3 Oaks Wrecking & Lumber Co., 65 Ill. App.2d 328, 213 N.E.2d 48 (1965), Kritzberg v. Kritzberg, Ill. App. Ct., 1st Dist., 3rd Div., No. 51071 (decided 3/16/67).

There being no record to the contrary, this court must assume that the order entered in #51172 dismissing the distress proceeding, was based upon the plaintiff's own motion, as it so recites. Furthermore, no bona fide jurisdictional defect exists as plaintiff contends. Jurisdiction having properly attached to the Circuit Court of Cook County, the alleged irregularity, if at all, was administrative in nature which would not warrant vacating the order.

In #51171 a quite similar rule obtains. The foregoing cases make it clear that our court will not consider questions of fact on appeal in absence of a record. While this court will, on the other hand, review issues of law without a Report of Proceedings, or the like, before it, Pilafas v. Pilafas, 39 Ill. App.2d 69, 188 N.E.2d 235 (1963), such issue/s must appear on the face of the common law record. Donahoe v. City of Chicago, 247 Ill. App. 435 (1928). Here, plaintiff's brief asserts inferentially that a question of law has been so presented to this court. We believe otherwise.

Plaintiff's first contention on this point is that, by failing to appear, the defendant has admitted the allegations of his complaint; to wit, a $220.00 indebtedness to plaintiff. While our court concedes to this possibility or probability, it does not necessarily follow, however, that the trial judge's entry of the order denying plaintiff's motion to amend the judgment to $220.00 was contrary to the manifest weight of the evidence, thereby raising a question of law. The reasoning

is twofold. First, our Civil Practice Act, Section 50(5) empowers a court to enter judgment in default for want of an appearance or pleading, but thereafter states the caveat:

> ". . . but the court may . . . , require proof of the allegations of the pleadings upon which relief is sought." [Ill. Rev. Stat. (1965) Chap. 110, Sec. 50(5)]

Such "proof" would necessarily require the court to weigh the facts, none of which appear of record before this court.

Second, although under our Civil Practice Act, Section 35(1) a verified allegation may, by admission thereto, constitute evidence, In re Jensik's Estate, 34 Ill. App.2d 130, 180 N.E.2d 740 (1962) (cert. denied 372 U.S. 953), such an admission, if at all, would constitute an admission of fact, not of law. Franz v. Schneider, 14 Ill. App.2d 464, 144 N.E.2d 798 (1957).

Even assuming the alleged admission of fact ($220.00 as liquidated damages) stood uncontroverted as evidence before the trial judge, this court has no record of the proceedings from which we could evaluate the propriety of the lower court's reason/s for limiting recovery, noting, as before, that under Section 50(5) the trial judge has the discretionary power to compel proof of the allegations. This court thus must indulge in the aforementioned presumption that the evidence heard was sufficient to support the judgment and order entered. The fact that the judgment was entered in default does not bar the operation of the presumption in favor of the validity and regularity of the judgment. Economy Truck Sales & Service, Inc. v. Granger, 61 Ill. App.2d 111, 209 N.E.2d 1 (1965).

Plaintiff next contends that the trial judge limited recovery on the theory that its action was limited to the amount specified in the five day notice action for possession contrary to the language and intent of Ill. Rev. Stat. (1965) Chap. 80, Sec. 8. While we agree that joint actions for both possession and rent may be brought under the

statute, this court must, nonetheless, deny relief on this point also, because (1) the statute relied upon is permissive only, and (2) nothing appears in the common law record which would indicate that the judge's ruling was founded upon any such erroneous interpretation of the statute. Only the language of the order appears and not the judge's reason/s for so ruling.

Where, as here in #51171, it is necessary to resort to evidence to determine a proposition of law, but no record is before us which may have otherwise included such evidence, the judgment and order must be affirmed, notwithstanding a statement of facts in plaintiff's brief which purports to set forth such evidence. Iczek v. Iczek, 42 Ill. App.2d 241, 191 N.E.2d 648 (1963), Heineman v. Mouzakiotis, 292 Ill. App. 640, 11 N.E.2d 220 (1937). Absent facts to evaluate, we cannot say that the judgment was contrary to the manifest weight of the evidence or that the judgment and order contradicted the statute or record.

For the above reasons, the order in #51171 denying plaintiff's motion to amend the judgment, and the order in #51172 denying plaintiff's motion to vacate the prior order of dismissal, are affirmed.

AFFIRMED.

BURKE, J., and BRYANT, J., concur.

82 I.A. 2 484

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY,
v.	)	FIRST MUNICIPAL DISTRICT.
JOSEPH A. CHICKERILLO,	)	No. 50209
GERHARDT J. BENCK,	)	No. 50210
ROBERT ARMSTRONG,	)	No. 50212
HENRY C. HIEMBERG,	)	No. 50216
GUS PARISI,	)	No. 50220
DONALD BIANUCCI,	)	No. 50221
MICHAEL FERRARO, Defendants-Appellants.	)	No. 50223

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

The cases above consolidated for consideration and opinion are appeals from fines imposed for violation of Section 228(b) of the Motor Vehicle Code, Ill. Rev. Stat., ch. 95-1/2, §228(b) (1963), which prescribes limitations on the gross weight of various motor vehicles and sets forth penalties for excessive loads. Appellants filed 29 virtually identical briefs within a period of about one month. In each case the defendant was convicted of operating a motor vehicle with a gross weight in excess of the statutory limit and in each case the overweight was substantial.[1] The authorities cited and contentions raised are the same in each case, and the issues have

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1. People v. Chickerillo, overweight - 31,660 lbs.
People v. Benck, overweight - 10,080 lbs.
People v. Armstrong, overweight - 14,150 lbs.
People v. Hiemberg, overweight - 14,750 lbs.
People v. Parisi, overweight - 14,120 lbs.
People v. Biannucci, overweight - 12,800 lbs.
People v. Ferraro, overweight - 22,720 lbs.

been resolved in favor of the appellee.

In addition to the cases hereinbefore cited, 14 companion cases were dismissed on procedural and substantive grounds. People v. Andrews, Illinois Appellate Court Gen. No. 50230; People v. Teggelaar, Illinois Appellate Court Gen. No. 50231-50243. The conviction in People v. Ziebell, Illinois Appellate Court Gen. No. 50211, was affirmed in a separate opinion.

In the cases here consolidated the State has failed to file briefs. The State has however replied to all the arguments here raised by filing briefs in eight companion cases, and further briefing would be of no assistance in the resolution of these remaining cases. Where the appellee has filed no brief in the reviewing court, the court may nevertheless consider the merits and affirm the judgment below. Werbeck v. Werbeck, 70 Ill. App. 2d 279, 217 N.E.2d 502; Spears v. Spears, 45 Ill. App. 2d 167, 195 N.E.2d 237; Ogradney v. Daley, 60 Ill. App. 2d 82, 208 N.E.2d 323; 541 Briar Place Corp. v. Harman, 46 Ill. App. 2d 1, 196 N.E.2d 498.

The issues presented by these appeals are well settled in favor of the appellee. The judgments are affirmed.

JUDGMENTS AFFIRMED

Sullivan, P.J. and Dempsey, J. concur.

Abstract only.